UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LI WEIXUM et al ,	)	
Plaintiffs,	)	Civ No. 04-cv-0649 (RJL)
v.	)	
BO XILAI,	)	
Defendant.	)	

FURTHER STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF THE UNITED STATES' SUGGESTION OF IMMUNITY

PETER D KEISLER
Assistant Attorney General

JEFFREY A TAYLOR
United States Attorney

JOSEPH H HUNT
Director, Federal Programs Branch

VINCENT M. GARVEY
Deputy Director, Federal Programs Branch

ALEXANDER K HAAS (CA Bar 220932)
Trial Attorney, U S Dep't of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave , N W., Rm 7328
Washington, D.C 20530
Tel 202-307-3937 – Fax. 202-616-8470
alexander.haas@usdoj gov
Attorneys for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

UNITED STATES CONSTITUTION

LEGISLATIVE MATERIAL

MISCELLANEOUS

INTRODUCTION

Pursuant to 28 U S.C. § 517,[1] the United States of America submits this further statement of interest to respond to issues raised by the Plaintiffs' Response ("Pl Res ") to the United States' Suggestion of Immunity and Statement of Interest ("USSOI"). The United States' previous filing established that this case should be dismissed because Minister Bo is entitled to special mission immunity and that adjudication of this case would create substantial foreign policy problems for the United States Because of the importance of these issues to the United States, and in light of Plaintiffs' Response, which demonstrates a fundamental misunderstanding of the source and nature of special missions immunity, the United States submits this further statement to ensure that the United States' position on these issues is fully set forth to aid the Court in its consideration of these matters.[2]

As discussed below, special missions immunity is recognized both in customary international law and domestically, as evidenced by the practice of the Executive Branch of the United States and the deference to that practice by courts of the United States. Moreover, the Executive Branch has authority to suggest immunity on behalf of high-level foreign dignitaries present in the United States on special missions. Plaintiffs themselves acknowledge that the Executive Branch's certification that Minister Bo is on a special mission to the United States is binding on this Court Indeed, the facts of this case make it a particularly compelling one for the

---

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States " 28 U S.C § 517.

[2] The United States will not address all the points raised by Plaintiffs, only those that warrant further discussion On all other points, the government relies on its initial Statement of Interest. .

special missions immunity to apply. Finally, the Plaintiffs' Response mischaracterizes other points raised in the government's previous submission such that some clarification is necessary.

ARGUMENT

I. Special Missions Immunity Is Recognized In Customary International Law And Is Distinct From The Immunity Enjoyed By Members Of Permanent Diplomatic Missions Under The Vienna Convention On Diplomatic Relations.

The United States' initial filing demonstrated that special missions immunity is recognized in customary international law and under domestic law through the practice of the Executive Branch in particular cases. In Sections II A-C of their response, plaintiffs' fundamental contention is that the Court should give no weight to the United States' immunity determination because only members of the permanent diplomatic missions of foreign States are eligible for immunity under the Vienna Convention on Diplomatic Relations (VCDR). Therefore, they argue, high level representatives of foreign States on special diplomatic missions to the United States should be regarded as having no immunities at all, as a matter of both United States and international law This argument is wrong and ignores both the history surrounding modern immunities and the Executive Branch's continuing authority to extend immunity to visiting foreign officials to further the interests of the United States

Plaintiffs' argument illogically assumes that because the international community has codified some customary international law rules with respect to the immunities of members of permanent diplomatic missions through the widely adopted VCDR, which the United States has ratified, no other immunities attach where the VCDR is not invoked See Pl. Res. at 2-6 Thus, plaintiffs argue that customary international law with respect to the immunities of those State representatives on special, non-permanent diplomatic missions either does not exist or is without

force in this case. The United States did not invoke the VCDR as the source of Minister Bo's immunity because Minister Bo's immunity is based not on the VCDR but on distinct principles of customary international law recognized and applied in the United States through the applicable exercise of the President's Executive authority under the Constitution. See USSOI at 4-11.

The core flaws in the plaintiffs' filing are its exclusive reliance on diplomatic immunity as codified in the VCDR and the erroneous implications drawn from the status of conventions attempting to codify customary international law. Indeed, as shown below, the history of the international community's efforts to codify the privileges and immunities enjoyed by foreign government officials on special diplomatic missions separately from those enjoyed by diplomats serving in permanent missions illuminates the flaw in plaintiffs' argument

Shortly after the Second World War and the founding of the United Nations, the United Nations General Assembly asked the International Law Commission (ILC) and the Sixth Committee of the General Assembly (Sixth Committee) to examine the customary international law governing the privileges and immunities of permanent as well as special diplomatic missions and to attempt to reduce those rules to widely acceptable written form See generally International Law Commission, Origins and Background & Organization, Programme and Methods of Work, http.//untreaty un org/ilc/ilcintro htm#origin (last visited Dec 5, 2006). Ultimately, these various privileges and immunities were addressed through separate conventions. The result was that, after years of preparation, a set of rules to govern the diplomatic staff of permanent missions was eventually proposed in the 1961 VCDR, and another set, to govern special diplomatic missions, was proposed in the 1969 UN Convention on Special

Missions, G.A. Res. 2530, 24 UN GAOR Supp. No. 30, at 99 (1969) [3]

The ILC and the Sixth Committee together carry out a function of the General Assembly specified in the United Nations' Charter:

> The General Assembly shall initiate studies and make recommendations for the purpose of
>
> 1 a promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.

See U.N. Charter art. 12, para. 1.a. Thus, the ILC and Sixth Committee operate under a two-pronged mandate when drafting conventions for international consideration (1) the progressive development of international law and (2) the codification of international law In light of this mandate, promulgated conventions contain not only statements of clearly established rules of customary international law on which widespread agreement among States can be expected, i.e., the codification of international law, but often contain some "progressive developments." Because States may not find themselves in unanimous agreement on some progressive principles incorporated into a convention, the inclusion of such concepts can sometimes explain why a particular convention does not become widely recognized But in such cases, the decision not to adopt a convention does not imply that no customary international law governs state conduct in a particular area as the plaintiffs appear to argue Rather, nonparticipating States continue to rely on customary international law instead of the convention to govern their conduct in that area and may in fact further the development of customary international law through their collective practice. See generally, Restatement (Third) of Foreign Relations, Introductory Note to Chapter

[3] Consular privileges, exemptions, and immunities were also made the subject of a separate convention, the 1963 Vienna Convention on Consular Relations. Because consular immunities are conceptually distinct from the immunities afforded members of special and permanent diplomatic missions, they will not be discussed here.

One, §§ 101-103, and related comments.

Differing reactions of the states have affected the histories of the VCDR and the Convention on Special Missions The VCDR, for example, won widespread acceptance and was ultimately ratified by the United States and, to date, some 186 other States, with many of the remaining States accepting the bulk of its provisions as an accurate expression of customary international law [4] The Convention on Special Missions, by contrast, has only 22 States as parties. Its failure to attract wider adherence is generally understood to reflect, at least in part, a view on the part of many states that the Convention properly codified the concept of special missions immunity in some respects but not in others. See generally, Decision of February 27, 1984, (Tabatabai) Case No. 4 StR 396/83, 80 Int'l L. Rep. 388 (1989); Malcolm N. Shaw, International Law 538-39 (Grotius, 4th ed 1997) This is entirely consistent with the fact that, in practice, the United States has suggested special missions immunity in some cases, but has not recognized it in others

From the fact that the United States and most other states have not ratified the Convention on Special Missions, the plaintiffs urge this Court to make an improper inference. The plaintiffs contend that simply because the Convention on Special Missions has not been widely endorsed as a codification of the rules of customary international law governing special diplomatic missions, no such rules exist. This is incorrect. As demonstrated in the government's original submission, such rules do exist, see USSOI at 10-11, the Executive Branch has the Constitutional authority to decide in which circumstances to apply them, id at 4-11, such a

[4] The Diplomatic Relations Act, for instance, provides: "With respect to a nonparty to the [VCDR], the mission, the members of the mission, their families, and diplomatic couriers shall enjoy the privileges and immunities specified in the [VCDR]." 22 U.S.C. § 254b.

determination has been made in this case with respect to Minister Bo, id. at 4, and this Court should abide by that determination, id. at 8-9. Indeed, the plaintiffs recognize that the Court must accept the determination that Minister Bo was on a special mission when he was present in the United States and purportedly served. See Pl. Res. at 12.

Notwithstanding this admission, in opposing the government's Suggestion of Immunity, the plaintiffs rely heavily on United States v. Sissoko, 995 F. Supp. 149 (S.D. Fla. 1997), and United States v. Kostadinov, 734 F. 2d 905 (2d Cir 1984) Such reliance, however, is misplaced. In Sissoko, the district court rejected a claim that a Gambian official was immune from prosecution based upon his alleged status as a special advisor on a special mission Key to the resolution of that case, however, was the absence of any recognition by the Department of State that a special mission existed or an immunity determination by the Executive Branch. See Sissoko, 995 F Supp at 1471 ("no such [Department of State] certification has occurred"). Simply because the Sissoko court (correctly) decided not to apply the Special Missions Convention in that case – something it obviously could not do in the absence of U S ratification – it does not follow that no rules of customary international law on special missions immunity exist. Nor does the fact that the Executive Branch chose not to suggest special missions immunity on the facts of that case mean either that no such rules exist or that they cannot properly inform an Executive Branch decision in an appropriate case. Similarly, the holding in Kostadinov that the defendant was not protected by the VCDR while on an ad hoc trade mission is not only manifestly correct, see 734 F.2d at 911-13, it is also irrelevant to a consideration whether an immunity not derived from the VCDR could apply to Minister Bo here. Indeed, Kostadinov merely confirms that a claim of special missions immunity unrecognized by the

United States is entitled to no weight before United States' courts. Neither Sissoko nor Kostadinov presents the situation in this case: Where the United States expressly recognizes the existence of a special mission to the United States and suggests immunity.

Finally, the plaintiffs' claim that "The U.S. Government has not accepted this type of immunity as customary international law," see Pl. Res p 6, is plainly incorrect Not only is the United States expressly asserting such immunity as customary international law in this case, but it has made similar assertions in other cases notwithstanding the fact that the United States has not joined the Special Missions Convention. After the promulgation of that Convention, the Executive Branch asserted - and the district court accepted – just such a position in the Suggestion of Immunity it filed in Kilroy v. Charles Windsor, Prince of Wales, Civ. No. C-78-291 (N.D Ohio, 1978) (see Attachments 2 (decision) and 3 (United States' suggestion) to USSOI) As in the present case, the Executive Branch did not rely on the terms of either the VCDR or the Special Missions Convention in making its suggestion of immunity. In exercising its Constitutional responsibility for foreign affairs generally, and in particular the President's express authority to receive ambassadors "and other public Ministers," U S Const., art II, § 3, the Executive Branch looked to customary international law rules concerning special missions immunity and the foreign policy interests of the United States and saw fit to recognize the immunity of that emissary The Court respected that determination and dismissed the action. See Attachment 2 to USSOI (Kilroy, Civ. No. C-78-291) at 4-6 For similar reasons, this Court should recognize the instant suggestion of special missions immunity and dismiss this action

II. The Executive Branch Has The Authority To Suggest Special Missions Immunity On Behalf Of Senior Foreign Government Officials Invited To The United Sates.

The United States established in its initial submission that the Department of State, on behalf of the Chief Executive of the United States, retains constitutional authority under the Constitution to extend immunity to visiting high level foreign officials. See USSOI at 4-5. In Section II.D of their Response, plaintiffs mistakenly argue that the "eligibility for diplomatic or any other form of immunity" is something that "only the courts can determine." See Pl. Res. at 11-12 (emphasis added). This argument, however, ignores the constitutional allocation of authority between the Executive and Judicial Branches and the established rules governing the courts' deference to Executive Branch determinations of a foreign government official's immunity from jurisdiction in appropriate circumstances

For example, under both the domestic law of the United States and the rules of customary international law, the Head of a foreign State is immune from U.S jurisdiction. See, e.g., Ye v Zemin, 383 F.3d 620, 624-27 (7th Cir 2004) (finding a Chinese Head of State immune from suit); Doe v. Roman Catholic Diocese of Galveston-Houston, 408 F. Supp. 2d 272, 277-79 (S.D. Tex. 2005) (holding Pope Benedict XVI immune from suit as Head of State for the Holy See), First Am Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 948 F Supp 1107, 1119 (D D.C 1996) (same for Head of State of the United Arab Emirates). In each of these cases, the Executive Branch made a determination that the Head of State was entitled to immunity from jurisdiction and communicated that determination to the court through a suggestion of immunity, the same method of communication that was employed in the instant case In each of these cases, the court not only recognized that the Head of State was immune, but also that it was a proper

exercise of Executive authority to make that suggestion. Thus, these cases stand firmly for the proposition that it is the Executive Branch that makes the conclusive determination of Head of State immunity that the courts are bound to accept. See Ye, 383 F.3d at 625 ("the Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry" requiring dismissal of claims of jus cogens human rights violations)

The President therefore has the constitutional authority to suggest immunity for foreign officials, such as a Head of State, entering the United States. Article II, Section 3 of the Constitution assigns to the President the authority to "receive Ambassadors and other public Ministers."[3] The very wording of Article II, Section 3 strongly suggests – if not explicitly provides – that the Executive Branch has constitutional authority to define the terms by which the President receives foreign emissaries. The Executive Branch could not conduct foreign affairs if it could not guarantee the safety, including safety from the jurisdiction of U.S courts, of foreign dignitaries invited to the United States to further official dialogue between nations Indeed, as the Supreme Court observed nearly 200 years ago, "a consent to receive [a public minister from a foreign sovereign] implies a consent that he shall possess those privileges which his principal [the foreign sovereign] intended he should retain – privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." Schooner Exchange v McFaddon, 11 U S (7 Cranch.)

[3] More broadly, Article II, Section 2 provides, inter alia, that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur " These two provisions, along with provisions vesting the "executive Power" in the President and requiring the President to "take Care that the Laws be faithfully executed," see U.S Const art. II, §§ 1, 3, confer on the President the authority to conduct foreign affairs. See generally Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) ("The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.").

116, 138-39 (1812) See also United States v. Benner, 24 F Cas 1084, 1086 (C C E.D. Penn. 1830). Because Article II, Section 3 expressly vests in the President the power and responsibility to "receive Ambassadors and other public Ministers," the exercise of discretionary foreign relations authority is not a fit subject for judicial consideration. Indeed, the Executive Branch's judgment to invite Minister Bo to the United States for talks and to afford Minister Bo special missions immunity to further the United States' foreign affairs functions, which was expressly made "in furtherance of the President's authority under Article II of the Constitution," see Letter of July 24, 2006 from Legal Adviser John B Bellinger to Assistant Attorney Genera Peter D. Keisler (Bellinger Letter) at 2, attached to USSOI as Attachment 1, is a political judgment to confer immunity that is not subject to challenge

Such judicial deference to the Executive Branch's suggestions of immunity is predicated on compelling considerations arising out of the conduct of our foreign relations. See Spacil v. Crowe, 489 F 2d 614, 617 (5th Cir. 1974) ("[O]nce the State Department has concluded that immunity is warranted, and has submitted that ruling to the court through a suggestion, the matter is for diplomatic rather than judicial resolution"); accord Ex parte Peru, 318 U S 578, 588 (1943).

Thus, courts are bound by Executive Branch determinations of Head of State and special missions immunity even though Congress, by ratifying the VCDR, has created a comprehensive system for recognizing the immunity of diplomats serving in the permanent missions of foreign States and, by enacting the Foreign Sovereign Immunities Act (FSIA), 28 U S.C §§ 1330 and 1602, et seq., for recognizing the jurisdictional immunity of the foreign States themselves. Through the FSIA, the task of determining the immunity of foreign States was transferred from

the Executive Branch to the courts. See H.R. Rep. No. 1487, 94th Cong , 2d Sess. 12 (1976), reprinted in 1976 U.S.C C A.N. 6604, 6610 (noting that the FSIA was intended to be exclusive as to claims of "sovereign immunity raised by foreign states" and political subdivisions).[5] The FSIA and the VCDR did not, however, alter Executive Branch authority to suggest either Head of State immunity for foreign leaders or any other recognized immunities not codified in those instruments, or affect the binding nature of such Executive Branch suggestions of immunity. See, e g , Ye, 383 F.3d at 625 ("The FSIA does not, however, address the immunity of foreign Heads of States") For this reason, "the decision concerning [] immunit[ies]" not subject to those instruments "remains vested where it was" before their enactment or entry into force – with the Executive Branch " See id This includes suggestions of special missions immunity

In response, plaintiffs rely on United States v. Al-Hamdi, 356 F.3d 564 (4th Cir. 2000). This reliance is misplaced. In Al-Hamdi, the Fourth Circuit considered the appeal of a Yemeni citizen challenging his conviction for possession of a firearm by a non-immigrant alien in violation of the Federal Firearms law Al-Hamdi argued that he possessed diplomatic immunity and that the Department of State later tried to revoke that immunity retroactively, in violation of the VCDR and the Constitution The Fourth Circuit recognized that a criminal defendant's

[5] The D C Circuit has found foreign officials to be cloaked in sovereign immunity as agencies or instrumentalities of the foreign state under 28 U.S.C. § 1603(b). See El-Fadl v Central Bank of Jordan, 75 F.3d 668, 671 (D.C Cir. 1996), Jungquist v Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1028 (D.C. Cir. 1997). Although the Court is bound by the Jungquist formulation, special mission immunity is a separate and distinct form of immunity that the FSIA was not intended to displace. Indeed, the FSIA was intended to be exclusive only to claims of "sovereign immunity by foreign states " Because the "FSIA was not intended to affect the power of the State Department, on behalf of the President as Chief Executive, to assert immunity for heads of state or for diplomatic and consular personnel" the Court remains "bound" to accept a determination of special mission immunity. First Am Corp , 948 F. Supp. at 1119 (head of state immunity), attach 2 to USSOI (Kilroy, Civ No C-78-291) at 4-6 (special missions context).

assertion of diplomatic immunity against prosecution by the United States compelled the court to evaluate competing interpretations of the applicable basis for immunity after giving "substantial deference" to the Department of State's interpretation of the Vienna Convention. See id. at 569. The Fourth Circuit also held, however, that once a court concludes that the Department of State's certification is based upon a "reasonable interpretation" of the applicable law, the certification is conclusive on the matter of diplomatic immunity. Id. at 571-73 Indeed, the Fourth Circuit held that it would "not review the State Department's factual determination that, at the time of his arrest, Al-Hamdi fell outside of the immunities of the Vienna Convention " Id at 573.

Even more instructive than the Al-Hamdi decision, however, is the long line of precedent in which courts have recognized the unique role of the Executive Branch in suggesting the immunity of senior foreign officials from the exercise of U S. jurisdiction. The paradigm for this allocation of authority is found in cases involving claims brought against foreign Heads of State, cases which conclusively demonstrate both that (a) immunity determinations are not merely for the courts to decide, and (b) courts are bound by Executive Branch determinations of such immunity. These same rules apply here to the Executive Branch's suggestion of special missions immunity. See Attachment 2 to USSOI (decision in Kilroy, Civ. No C-78-291) at 4-6.

In this context, then, the Court's consideration of the government's suggestion of special missions immunity should be guided by three propositions. First, as the plaintiffs concede, the Court is bound to accept the determination that Minister Bo was on a special diplomatic mission, see Pl Res at 12; Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949); see also Bellinger Letter at 2. Second, as stated in the Suggestion of Immunity itself, see USSOI at 7-8, special missions immunity, though infrequently invoked, has been recognized in the United States both

before and after the advent of the FSIA and the VCDR and is part of both the domestic common law and customary international law See Bellinger Letter at 2-3 And finally, because the determination of special missions immunity has not been transferred to the courts, such a determination, like that for the immunity of a Head of State, head of government, or foreign minister, remains a prerogative of the Executive Branch, and one that the Judicial Branch should respect. Based upon the foregoing, the Executive Branch's determination of special missions immunity must be upheld.

III. Immunity Has Not Been Waived In This Case.

In Section V of their Response, plaintiffs argue that China and Minister Bo have waived any immunity arguments because of their failure to appear. See Pl. Res. at 19-21 Plaintiffs are incorrect.

The lack of an appearance by China or Minister Bo in this case has no bearing on the Court's obligation to recognize the United States' suggestion of immunity The Supreme Court has not qualified its conclusion that courts are bound by such suggestions of immunity with a requirement that the defendant on whose behalf immunity is suggested appear in the lawsuit and claims immunity him- or herself. See, e g., Republic of Mexico v Hoffman, 324 U.S 30, 35-36 (1945); Ex parte Peru, 318 U.S at 588-89 Indeed, it is common for the United States, and not the foreign State, to suggest immunity when neither the VCDR nor the FSIA form the basis of that immunity, and the Courts regularly defer to such suggestions of immunity by the United States See Attachment 2 to USSOI (Kilroy, Civ No. C-78-291) at 4-6 (accepting United States' suggestion of special missions immunity on behalf of Prince Charles who did not appear); Ye, 383 F.3d at 624-27 (accepting United States' suggestion of immunity where defendant foreign official

did not appear); see also Tachiona v. Mugabe, 169 F. Supp. 2d 259, 296-97 (S.D.N.Y. 2001) (accepting United States suggestion of immunity and dismissing lawsuit against President Mugabe where he had not appeared), aff'd in part on other grounds, 386 F.3d 205 (2d Cir 2004).[6]

IV. Plaintiffs Misstate The United States' Position Regarding The Applicability Of The FSIA And The Act Of State Doctrine.

Contrary to plaintiffs' reading of the United States position, see Pl. Res. at 13-14, the United States did not suggest that the FSIA and act of state doctrine were inapplicable. See USSOI at 17 ("[u]nder the law of this Circuit, Minister Bo could well be viewed as an 'agent' or 'instrumentality' of China under the FSIA") Rather, given Minister Bo's immunity from personal service and the grave foreign policy implications of adjudicating this case, the United States properly suggested that this Court need not and should not address the FSIA and act of state issues because doing so would be both unnecessary and require diplomatically sensitive inquiries by the Court. See USSOI at 18-19.

While the Court should not engage in this inquiry for the reasons stated, it is clear under binding Supreme Court and D.C. Circuit precedent that in cases involving the FSIA – which, again, sets forth exceptions to the general immunity foreign States enjoy – the courts have refused to recognize alleged violation of jus cogens norms of international law in the form of violation of human rights as an exception to a foreign State's immunity in a civil case against that State. E.g., Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993) ("however monstrous [the alleged torture and detention of the claimant] may be, a foreign State's exercise of the power of its police

[6] Moreover, the D.C. Circuit has held that foreign defendants with available FSIA defenses may refrain from appearing and assert a "jurisdictional objection" under the FSIA "[w]hen enforcement of the default judgment is attempted." Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1547 (D.C. Cir. 1987).

has long been understood for purposes of the restrictive theory [of foreign sovereign immunity] as peculiarly sovereign in nature"); Princz v Federal Republic of Germany, 26 F 3d 1166, 1173-74 (D C Cir. 1994) (rejecting argument that alleged violation of jus cogens norms by Third Reich constituted an implied waiver of Germany's sovereign immunity); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992) ("The fact that there has been a violation of jus cogens does not confer jurisdiction under the FSIA ") [5] Similarly, the ratification of an official's conduct by the foreign State could be the basis of finding that the act of state doctrine applied, even if the allegations claim that the conduct is ultra vires because they amount to gross human rights abuses. See Doe v Israel, 400 F Supp 2d 86, 104 (D.D.C. 2005). In light of the sensitivity of these inquiries under the applicable law and the clear basis for special missions immunity in this case, however, the Court need not resolve these issues. See Michel v. I.N S., 206 F 3d 253, 260 n 4 (D.C Cir 2000)

CONCLUSION

For the foregoing reasons and the reasons stated in the United States' initial filing, the United States asks that this action be dismissed.

Dated: December 6, 2006

Respectfully submitted,

PETER D KEISLER
Assistant Attorney General

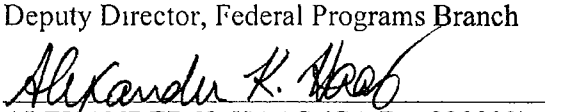
KENNETH L WAINSTEIN

[5] Likewise, the legislative history of the Torture Victim Protection Act reflects Congress' recognition that the nature of the allegations in a lawsuit do not bear on issues of immunity H R. Rep. No. 102-367, at 5 (1991), reprinted in 1992 U S C C A N. 84, 88 ("nothing in the TVPA overrides the doctrines of diplomatic and Head of State immunity. These doctrines would generally provide a defense to suits against foreign Heads of State and other diplomats visiting the United States on official business")

United States Attorney

JOSEPH H. HUNT
Director, Federal Programs Branch

VINCENT M. GARVEY
Deputy Director, Federal Programs Branch



ALEXANDER K. HAAS (CA Bar 220932)
Trial Attorney, U.S. Dep't of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave , N W , Rm. 7328
Washington, D C 20530
Tel. 202-307-3937 – Fax 202-616-8470
alexander haas@usdoj gov
Attorneys for the United States of America